



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Winding Up Cause 23 of 2011**

**HACIENDA DEVELOPMENT HOLDINGS LIMITED ..... APPLICANT**

**VERSUS**

**IN THE MATTER OF THE COMPANIES ACT ..... RESPONDENT**

**R U L I N G**

1. When Mr. Odhiambo for the Applicant and Mr. Billings for the Respondent appeared before me on 26 July 2012, Mr. Amolo also appeared stating that he was from the firm of Amolo & Kibanya, advocates acting for Hacienda Development Limited and Bokin Holdings Limited. Before Court on that day for hearing was the Application by way Notice of Motion dated 8 February 2012 filed by Messrs Muturi Gakuo & Co. and the Application again by Notice of Motion dated 9 February 2012 filed by Messrs Kiptinness & Odhiambo on behalf of Pangea Development Holdings Limited. Mr. Amolo's appearance before court was accompanied by a Notice of Intention to Appear on Petition dated the same day, such notice detailing that the advocates firm appeared for Hacienda Development Limited being the holder of 93% of the shareholding in Hacienda Development Holdings Limited ("the Company") as well as for Bokin Holdings Limited, a creditor of Hacienda Development Holdings Limited pursuant to an Agreement for Sale of LR No.MN/II/4887 Mombasa (hereinafter called "the suit property").

2. Mr. Amolo informed the court that he appeared for the two companies as above and that he wanted to be on record with regard to the winding up of the Company. As far as Bokin Holdings Ltd was concerned, a company which he also represented, it was the registered owner of the suit property. He informed the court that there were to other proceedings pending in Mombasa in which Bokin Holdings Limited is a Plaintiff in one and the Defendant in another. The Company similarly is the Defendant in one and the Plaintiff of the other. Counsel noted that Mr. Adam Tuller a director of the Company had not notified Mr. Amolo's client, a Mr. Sam K. Nyamweya, of the existence of these proceedings. It was noted that Mr. Tuller and Mr. Nyamweya were directors and shareholders in Hacienda Development Limited which company owned of the 93% shareholding in the Company. Mr. Amolo commented that the suit property comprised of a 500 acre piece of prime private land in Mombasa which is the subject of pending proceedings both here and in Mombasa. Any order made here would affect the two companies as well as the suit property. Counsel stated that his client did not know the position with regard to the winding up of the Company and requested that the Petitioner, and as far as possible the Company should provide him with copies of all documents in relation to this suit for inspection purposes. Mr. Amolo stated that Mr. Tuller did not have an overriding interest in the company Hacienda Development Limited to the exclusion of Mr. Nyamweya.

3. In response, Mr. Billings conceded that the interest of Mr. Nyamweya would be affected and he concurred that Mr. Amolo should be supplied with all documents in this matter so that he could ascertain

what his position would be in relation to the same. He considered it the duty of the Applicant to have served all the parties who may have been affected by the Application. In turn, Mr. Odhiambo opposed Mr. Amolo's application to adjourn this matter before court and he also opposed the intention to appear. He noted that the Application was made under the provisions of **section 169** of the *Companies Act* to appoint an investigator. This is not a winding-up application. He informed the court that Mr. Amolo had acted for Mr. Tuller as well as other interested parties in the past. He noted that Mr. Tuller had clearly stated in his Replying Affidavit that he was filing the same as a director of Hacienda Development Limited on his own behalf as well as on behalf of Mr. Nyamweya. The issue of the joint development company (the Company) is in contention. This is the subject of all the pleadings in this matter. In counsel's view it would not be proper for Hacienda Development Limited to interfere with the position of the Company sought to be wound up. Mr. Tuller had admitted at paragraph 17 of his Affidavit in support of the Application dated 8 February 2012 that he and Mr. Nyamweya had transferred the suit property from the Company to Hacienda Development Limited, in counsel's opinion, illegally. Mr. Odhiambo further submitted, that it was disingenuous to come before Court to say that the company wishes to be heard when it has already admitted to illegally transferring the suit property. He asked that the request for adjournment and the joining of the intended parties be rejected. However if the court was to accede to the same, he would request an early hearing date.

4. In his rejoinder, Mr. Amolo stated that he did not know that the application before court was not a winding up cause. Concerning the issue that he had acted for Mr. Tuller before, that really was an issue for Mr. Billings to answer. He stated that it could not be true that Mr. Tuller was looking after his interests as well as those of Mr. Nyamweya. He stated that if it is true that the shareholding in the Company is held in contention, then that was more reason why the two companies which he represented should be heard in the matter before any investigator was appointed. The two cases in Mombasa related to claims and counterclaims as to the ownership of the suit property. He maintained that the application that he had made was not only to request of the Court to consider the application to join the two companies that he represented, as interested parties.

5. I have considered the Replying Affidavit of Mr. Tuller dated 8 February 2012. Two paragraphs in that Replying Affidavit I consider are pertinent to Mr. Amolo's application for the two companies that he represents to be joined herein as interested parties. They read as follows:

**"3. That prior to June 2006 before the formation of the joint venture company, I was introduced to Mr. Bruce Bouchard by Mr. James R. Dry, who informed me that Bruce Bouchard was involved in similar work to mine in low cost housing in Zambia and Ghana and that we should meet as we had much in common on this subject. After much deliberations, we did form a joint venture company with Bouchard's company, Pangaea Development Holdings Ltd, (hereinafter referred to as "PDHL") which company is registered in Botswana, and selling shares on the OTC market, and my company Hacienda Development Limited (hereinafter referred to as HDL), to jointly develop an Eco-City that I had created and planned with suitable professional consultants input. This project was entirely innovative and the first of its kind in Africa.**

**4. That the joint venture company did indeed acquire what was registered as L.R. MN/11/10279 situated at Mombasa Municipality from Bokin Holdings Ltd, a company owned by one Samson Nyamweya. However contrary to what is stated at Paragraph 3 of the Supporting Affidavit, the sum of US \$ 1.0 million paid out was not for "the project" as claimed, but for the parcel of land that the project would be created upon, nor was it the full and final price, as the value of the land was U.S. \$ 2.0 Million and the balance was supposed to be paid out as a sum per unit through the build out".**

6. I have also considered the contents of three paragraphs in Mr. Tuller's Replying Affidavit sworn on 18 June 2012. These read as follows:

**"3. THAT one Samson Nyamweya Kiungiu is a 50% shareholder of Hacienda Development Limited having been given these shares by myself to protect our mutual interest in our project located on L.R. MN/11/10279 Mombasa. I now exhibit herewith and show to Court true Photostat**

**copies of the transfer of shares from myself to Mr. Onyango Keyuka, Mr. S. Nyamweya's nominee and further transfer from Mr. Onyango Keyuka to Mr. Samson Keengu Nyamweya now annexed herewith and marked as Exhibit AT-1.**

**4. THAT Bruce Bouchard did illegally without the knowledge and consent of the board of directors of Hacienda Development Holdings Limited and without any board resolution to sanction this activity, encourage Sam Nyamweya to get undertakings requested by Bokin Holdings Limited through Ndung'u Njoroge & Kwach Advocates to procure credit up to Kshs. 100 Million from the 4<sup>th</sup> June, 2008. I now exhibit herewith and show to Court true Photostat copies of the letter from Ndung'u Njoroge & Kwach to Credit Bank now annexed herewith and marked as Exhibit AT-2.**

**5. THAT Bruce Bouchard did intend to defraud Mr. S. Nyamweya by promising to pay this sum to Credit Bank to relieve Mr. Nyamweya of the distress that he had deliberately placed him in, but had no intention of providing him relief. I now exhibit herewith and show to Court true Photostat copies of emails sent by Bruce Bouchard first offering Mr. Nyamweya Kshs. 60 Million, which would have left him disadvantaged and in distress. Then offering him Kshs. 94 Million annexed herewith and marked as Exhibit AT-3”.**

7. It seems to me having considered the contents of the paragraphs from Mr. Tuller's Replying Affidavits, that the gentleman has a separate agenda from that of Mr. Nyamweya, although they may be co—shareholders and directors in Hacienda Development Limited. I'm not sure that it can be said that Mr. Tuller speaks for Mr. Nyamweya in these proceedings. From the letter dated 28 July 2010 from the Deputy Registrar of Companies annexed to Mr. Tuller's Replying Affidavit of the 18 June 2012, it would seem that Mr. Tuller and Mr. Nyamweya's nominee Mr. Onyango Keyuka are each the owners of 50 shares in Hacienda Development Limited. As far as the company Bokin Holdings Ltd is concerned, it seems from the Agreement for Sale dated 27 April 2006 which is annexed to Mr. Tuller's Replying Affidavit of 8 February 2012, that Bokin Holdings Limited was the registered owner of the suit property and agreed to sell the same jointly to Hacienda Development Limited and Pangaea Holdings LLC. I have understood from Mr. Tuller's said affidavit, that the purchase price has not been paid in full and consequently Bokin Holdings Limited must necessarily be an interested party as a creditor of the Company.

8. All in all therefore, I feel that I must accede to Mr. Amolo's request that Hacienda Development Limited as well as Bokin Holdings Limited be joined as interested parties to this suit. Orders accordingly. Parties may now take an appropriate date at the Registry for the hearing of the two outstanding Applications dated the 8th and 9th of February 2012 respectively. In view of the fact that the suit property is situated in Mombasa and that there are two current suits pending for determination in the Mombasa District Registry, parties should consider my strong feelings that this suit should be transferred to Mombasa as soon as possible.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July 2012.**

**J. B. HAVELOCK  
JUDGE**